IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1073 OF 2004

Bharat Gulabrao Borge
Age: 38 years,
R/at Karandi, Tal. Bhor,
District: Pune.
At present in Sindhudurg Central Jail .. Appellant
(Orig. Accused)

v/s.

1. The State of Maharashtra
(Copy to be served on
Public Prosecutor of High Court
of Judicature at Bombay)

2. Asha Ramesh Chavan, .. Respondents
Sagar Bunder, Guest House Quarter
of Cook, Vengurla, Dist. Sindhudurg.

Mr. J. Shekhar i/by M/s. J. Shekhar & Co. for the appellant.
Ms. M.M. Deshmukh, Addl. Public Prosecutor for the State.

ALONGWITH

CRIMINAL APPEAL NO.1278 OF 2006
(for enhancement of sentence)

The State of Maharashtra .. Appellant

v/s.

Bharat Gulabrao Borge
Age: 38 years,
R/at Karandi, Tal. Bhor,
District: Pune. .. Respondent

(Orig. Accused)

Ms. M.M. Deshmukh, Addl. Public Prosecutor for the State.
Mr. J. Shekhar i/by M/s. J. Shekhar & Co. for the respondent.

CORAM : J. H. BHATIA, J.
DATED : 9TH APRIL, 2007

ORAL JUDGMENT

Both these appeals may be disposed of by the common judgment as they arise out of the same order of conviction and sentence passed by the Additional Sessions Judge, Sindhudurg at Oros in Sessions Case No.54 of 2003. One appeal is filed by the accused challenging the conviction and sentence and another is filed by the State for enhancement of sentence.

2. The prosecution case in brief is that the accused-appellant was occupying one of the quarters provided for Customs Staff as he was in service of the Customs Department at Vengurla. Just near his house, there was a guest house of Customs Department and father of the prosecutrix was serving as Khansama in the said guest house. The prosecutrix was residing in the quarter provided to her father by the Customs Department. The prosecutrix was aged about 10 years at that time. On 6.7.2003 at about 12.00 noon, the prosecutrix was proceeding towards the house of her friend. At that time, the accused called her for cleaning utensils and sweeping the house as she generally used to do that work at his house and the accused used to take her coaching as she was student of 5th standard. As desired by the accused, the prosecutrix went to his house for cleaning the utensils. While she was sweeping the floor of the house, the accused made her lie on the bed, removed her underwear, shut her mouth and

committed rape on her. This caused a lot of pain and also bleeding from her vagina. After the act was over, the accused threatened her not to disclose this fact to anybody. She picked up her nicker and returned to her house. As her father was of hot temperament, she was afraid to disclose this fact. On that day, after returning home, she slept in the house. Thereafter for four days, she used to attend her school. On 11.7.2003, she did not go to school. On that day, her mother noted some blood spots on her underwear, gown and petticoat. When she enquired about it, the prosecutrix disclosed that she was raped by the accused on 6.7.2003. In the evening, when her father came back from duty, the incident was narrated to him by mother of the prosecutrix. On 12.7.2003, she was taken to the Police Station, Vengurla, where the report was lodged by the prosecutrix and Crime No.38 of 2003 came to be registered under section 376(2) of I.P.C. During the investigation, the prosecutrix as well as the accused were subjected to the medical examination. Clothes of the prosecutrix were collected and referred to the Chemical Analyser. Similarly, the blood stained bed sheet in the house of accused and his underwear were also seized and sent to the Chemical Analyser. After the investigation, chargesheet was filed and the case was committed to the Court of Sessions.

3. Charge was framed against the accused under section 376(2)(f) of I.P.C. Accused pleaded not guilty. According to him, at the relevant time, he was on duty as Wireless Operator at Amboli which is about 70 kms. from the spot of incident. It is also contended that about certain monetary transactions he had dispute with the parents of the prosecutrix and therefore, he was falsely implicated in this case. On behalf of the prosecution, in all seven witnesses have been

examined. The accused also examined one witness in his defence to prove his plea of alibi. After hearing the evidence of both the side and taking into consideration all the circumstances, the learned trial court rejected the plea of the accused and convicted him for the offence punishable under section 376(2)(f) I.P.C. and sentenced him to undergo R.I. for seven years and to pay fine of Rs.5000/-. In default to pay fine, he was to undergo further R.I. for two years. Out of the fine amount, the amount of Rs.4000/- was directed to be paid to the prosecutrix as compensation.

4. Being aggrieved by the conviction and sentence, the accused has preferred criminal appeal No.1073 of 2004. According to him, the learned trial court failed to scrutinise and appreciate the evidence correctly and came to the wrong conclusion. On the other hand, the State has preferred appeal No.1278 of 2006 seeking enhancement of the sentence on the ground that for the offence committed by the accused, the minimum sentence prescribed by law is 10 years R.I. and there was no adequate reason to award lesser sentence.

5. Heard Mr. J. Shekhar, the learned counsel for the accused-appellant and Ms. Deshmukh, the learned A.P.P. Perused the record and proceedings of the trial court.

6. Admittedly, Ramesh Chavan, father of the prosecutrix was serving as Khansama or Cook at Sagar Rest House of Customs Department at Vengurla. Just near the said rest house, there are quarters provided for the staff of the Customs Department. A few feet away the Rest House, the residential quarter was provided to Ramesh Chavan. The accused was serving as a wireless operator with the

Customs Department and his place of the duty was Amboli which is at the distance of about 70 kms. from Vengurla. However, he was also provided residential accommodation at Vengurla in the staff quarters just near the said rest house.

7. P.W.1 is the prosecutrix and P.W.3 Bharti is her mother. P.W.2 Anjali Manjrekar runs a tea stall within the campus of the office and residential quarters of the Customs Department in Vengurla. The evidence of the prosecutrix reveals that on 6.7.2003 at about noon time, she finished her studies while her sister Usha was yet to complete her studies. Therefore, the prosecutrix left the house telling her sister that she was going to her friend Tejaswini, who also resides in the staff quarters within the same complex. According to her, while she was passing from near the house of the accused, he called her for cleaning the utensils. She was not inclined because she was proceeding to her friend's house but as the accused insisted, she went to his house for cleaning the utensils and thereafter, on the request of the accused, she also began to sweep the floor of his house. She deposed that when she was sweeping the floor, the accused caught her hand and pushed her on the bed. She asked him as to what he was doing and she also asked him to leave her but in vain. The accused removed her underwear and raised her petticoat and gown. Thereafter, he actually committed rape on her by inserting his penis in her vagina. She raised shouts as `Aai Aai' but the accused pressed her mouth and stopped her from shouting. He also raised the sound of Taperecorder and T.V. to the high pitch. She deposed that after discharge of some sticky fluid, the accused left her. Because of this act she felt severe pain and also bleeding. According to her, after the incident, she went to her house and found

that her mother was in kitchen. She washed her legs and private part in the bathroom. Thereafter, she changed her clothes which were stained with blood and at that time, she gave false explanation to her mother that her gown was soiled. Thereafter, on 7th, 8th, 9th and 10th July, she attended the school but on 11th July, she did not go to school as she was not feeling well and was sleeping at home.

8. The evidence of her mother P.W.2 Bharati reveals that she used to wash clothes of her children and on 11th July, when she was washing clothes, she noted blood stains on the gown, nicker and petticoat of the prosecutrix. Therefore, she asked her whether she had menses but she disclosed that on 6th July, the accused had committed rape on her at his house. According to P.W.3 Bharati, thereafter she went to the office of the accused and asked him about the incident. The accused told her that he had committed mistake and she should forgive him. Thereupon, she gave chappal blows on his head. In the evening, her husband came back and she told him that the accused had committed rape on their daughter. On 12th July, the prosecutrix was taken to the Police Station where she lodged the report Exhibit 10.

9. The evidence of P.W.2 Anjali reveals that at the time of the incident, she had no customers and therefore, she was sitting on the Bench. Firstly, she noticed the prosecutrix coming out from the backside of the house of the accused but on seeing Anjali, she went back and after some time, she again came from that side. At that time, Anjali called her near her. At that time, she noted some blood stains on her foot. According to P.W.2 Anjali, she felt that the girl might have undergone first menses and therefore, she did not deem it

proper to put any more question to her. After that the prosecutrix went to her house. This evidence of Anjali Manjrekar provides some corroboration to the testimony of prosecutrix.

10. After registration of the offence, the prosecutrix was taken to Civil Hospital, Oros where she was examined by P.W. 5 Dr. Ramchandra Patil. On examination, he found that the victim's hymen was ruptured and she had minimum bleeding through cervix but there was no injury on her person or on the private part of the prosecutrix. He explained that the mark of injuries would not last for more than 5 to 6 days. It may be noted that she, being a young girl aged about 10 to 12 years, was not in a position to offer any resistance and therefore, there could not be any injury either on the body of the accused or on herself. Taking into consideration her age, in the case of rape by a grown up person, she was bound to have some injury to the private part but as she was examined six days after the incident, it was not possible to find such injuries also. However, the medical evidence proves that her hymen was ruptured and this provides corroboration to her testimony.

11. The evidence on record reveals that nicker, gown and petticoat of the prosecutrix marked as Articles `A', `B' and `C' as well as nicker of the accused marked Article `D' and the bed sheet-Article `E', which was seized from the house of the accused, were referred to the Chemical Analyser. As per the Chemical Analyser's report (Exhibit 27), the blood stains of group `B' were found on her clothes. It also reveals that her blood group was `B'. As per the Chemical Analyser's report, two semen stains were found on her nicker and they were of `O' group. Blood of the accused was of `O' group as per the

Chemical Analyser's report (Exhibit 29). On the bed-sheet Article `E' also stains of human blood were found but the results were inconclusive about the group of the blood. Taking into consideration the Chemical Analyser's report and the oral evidence, it becomes clear that the prosecutrix had not attained the puberty and had not undergone her menses. According to her, she was raped by the accused and because of that, there was bleeding from her vagina. The blood stains of `B' Group were found on her nicker, gown and petticoat. The blood stains were of `B' Group which was her own. Semen stains were found on the nicker and those semen stains were of `O' Group which is of the accused. This provides strong corroboration to her testimony.

12. It was contended before the trial court as well as before this court that taking into consideration the situation of the houses of the prosecutrix and the accused and the tea stall of Anjali Manjrekar, as per the map (Exhibit 19/1), P.W.2 Anjali Manjrekar was not in a position to see the prosecutrix coming out from the backside of the house of the accused. The map reveals that the house of the accused had four rooms. Front door of his house is towards eastern side while the backside door, marked `D5' in the said map, is towards western side. House of the prosecutrix was towards South-West of the Customs Department while the tea stall of Anjali Manjrekar was to the North-East side of the said house. If the prosecutrix after coming out from the backside door of the house of the accused would straight proceed towards her own house and if P.W.2 Anjali Manjrekar was sitting near her tea stall, she could not be in a position to see the prosecutrix leaving the house of the accused. However, it may be noted that distance of the northern end of the house of accused, is

hardly 7 to 8 feet from the backside door and if the girl after coming out of the backside door moved towards the northern side only by 4 or 5 paces, she could be seen by Anjali Manjrekar. It may be noted that at that time, the prosecutrix, who was young girl, was not only in pains but must also be in a traumatic condition. It is possible that before going towards her house straight, she might have moved to the side for spaces. Of course, there is no direct evidence about it. However, Anjali Manjrekar deposed that she had seen the prosecutrix coming out from the backside of the house of the accused but as soon as the prosecutrix saw her, she went back and when Anjali Manjrekar concealed herself behind some tree, the prosecutrix again came out and then P.W.2 Anjali called her and the prosecutrix actually came near her. At that time, she noted some blood stains on her foot. Because the girl was aged about 11 to 12 years, P.W.2 Anjali felt that she might have first menses and therefore, she did not deem it proper to put any more questions about the blood stains. After that, the prosecutrix went away. Taking into consideration the evidence of Anjali Manjrekar and the circumstances noted above, I find that her evidence cannot be discarded nor it can it be held that she had not got opportunity to see the prosecutrix immediately after the incident.

13. During the cross-examination of the prosecutrix, it was pointed out that she had made some improvements in her evidence. The learned trial court has dealt with each of the omissions in detail and came to the conclusion that none of them was fatal to the prosecution. Some omissions may be even natural. After going through the evidence and the reasons given by the trial court, I find no fault in ignoring such omissions and alleged improvements in her evidence. Delay of six days is also properly explained. She did not disclose the

fact due to fear of father as he was of hot temperament. However, when blood stains on her clothes were noticed by her mother she disclosed the facts. In the evening her father came and next day the report was lodged. It is well settled position of law that the conviction in a rape case can be based on the sole testimony of the prosecutrix, provided her evidence is found trustworthy and credible. If in the given circumstances of the particular case, the court finds it necessary before relying on the sole testimony of the prosecutrix, it may look for some assurance, short of corroboration, that the prosecutrix was really speaking the truth and she was reliable. In the present case, the prosecutrix was young girl, aged about 10 to 12 years, she has explained the actual incident minutely. She suffered from rupture of hymen and bleeding because of that incident. Blood stains were found on her clothes. Not only that semen stains of the accused were also found on her nicker. Blood stains were also found on the bed sheet on the bed in the house of the accused where rape was committed on her. These circumstances provide strong corroboration to her testimony. I find that the evidence of the prosecutrix is truthful and trustworthy and there is no reason to disbelieve her.

14. It may be noted that the accused had taken two-fold defence. Firstly, according to him, at the relevant time, he was on duty as wireless operator at Amboli at a distance of 70 kms. and therefore, he could not be present at the spot where the alleged offence was committed. However DW1 Ramakant had no personal knowledge as to where the accused was at the relevant time. The evidence reveals that the accused was the only person on duty at Amboli and he himself used to maintain his attendance register also. Therefore, it

was not difficult for him to prepare the attendance register, according to his convenience. It may further be noted that in the attendance register wherever there were holidays, those days were rounded off and every week, two such days are rounded off because they were Saturdays and Sundays. 5th and 6th July, 2003 were also rounded off in the attendance register indicating that both the days, being Saturday and Sunday, were holidays to the Central Government offices. Therefore, the plea of alibi taken by the accused is not proved.

15. Next defence of the accused was that there were certain monetary transactions due to which some dispute had taken place between himself and father of the prosecutrix but this plea was turned out by P.W.3 Bharati and there is no material to show that there was any dispute between the accused and father of the prosecutrix. On the other hand, the evidence on record reveals that the accused and father of the prosecutrix were good friends and that is why the accused used to take her studies and as and when he required, the prosecutrix also used to render some domestic services to him. Therefore, I find no substance in the defence taken by the accused.

16. Mr. J. Shekhar, the learned counsel for the accused-appellant placed reliance on the several authorities in support of his contention that the prosecutrix could not be relied upon. Mainly, he placed reliance upon ***Devinder Singh and ors. v. State of Himachal Pradesh, AIR 2003 SC 3365***, ***Vimal Suresh Kamble v. Chaluverapinake Apal S.P. & anr., AIR 2003 SC 818*** and ***Ramdas & ors. v. State of Maharashtra, AIR 2007 SC 155.*** In each of these

cases, the Supreme court, after scrutiny of the facts of those cases, acquitted the accused as evidence of the prosecutrix was not found to be trustworthy and reliable. However, there was no departure from the settled legal position that the sole testimony of the victim of the sexual offence can be basis for conviction provided it is safe, reliable and worthy of acceptance. In ***Sudhansu Sekhar Sahoo v. State of Orissa, 2003 SCC (Criminal) 1484***, the Supreme Court in para 11, observed that the sole testimony of the victim of a sexual offence can be a basis for conviction provided it is safe, reliable and worthy of acceptance.

In the present case, I find that the evidence of prosecutrix is cogent, convincing and trustworthy and is also supported and corroborated by the other evidence. I find her evidence safe, reliable and worthy of acceptance.

17. Taking into consideration the evidence discussed above, I find no fault in the conviction of the accused for the offence of rape. The prosecution seeks enhancement of the sentence mainly on the ground that under section 376(2)(f) I.P.C., where a girl below the age of 12 years is raped, the minimum sentence of imprisonment shall be 10 years, unless there are adequate and special reasons to be mentioned in the judgment for imposing a lessor sentence. It may be noted that even though the prosecutrix deposed in her deposition that her date of birth was 5.7.1993 and thus, on 6.7.2003, when this incident occurred, she was exactly 10 years old. however, the learned trial court noted that in her evidence, recorded by the court in June, 2004, P.W.2 Bharati had stated that age of the prosecutrix was 12 years and at the time of incident she was 11 years old. It is material

to note that no documentary evidence was placed on record to prove the date of birth and her age. The evidence of P.W.5 Dr. Ramchandra Patil reveals that the prosecutrix was referred to Dentist for determining her age and as per the report of the Dentist and as per the general observation of the prosecutrix, she was aged about 12 years. There is no reliable evidence on record that the prosecutrix was less than 12 years at the time of this incident. In view of this, the case would fall under section 376(1) and not under section 376(2)(f). For the offence of rape under section 376, the punishment is imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and also fine.

18. It appears that though the learned trial court convicted the accused under section 376(2)(f) and it awarded sentence less than minimum on the ground that he has old parents, wife, young children to take care of and that he is likely to lose his job. In fact, none of these reasons can be good ground for awarding sentence of imprisonment less than the minimum prescribed. If he is convicted for the offence of rape and even if he is required to undergo sentence for a single day, he is bound to lose his job. However, I find that in view of the circumstances noted above, the accused could be convicted under section 376(1) and therefore, this sentence of R.I. for seven years and fine of Rs.5000/- is just and reasonable and it is as per the provisions of law. Therefore, the appeal preferred by the State for enhancement of sentence is also liable to be dismissed.

19. At this stage, Mr. Shekhar, relying on ***Raj Kumar alias Raju Yadav alias Raj Kumar Yadav v. State of Bihar, (2006)3 SCC***

(Criminal) 112, contended that in this case, there was delay of six days in lodging the F.I.R. and the accused had already undergone sentence of about three years and therefore, he may be awarded sentence as already undergone. In the case of Raj Kumar, it appears that keeping in view that there was a delay in lodging the F.I.R. and the doctor, who had examined the victim, did not find any confirmatory evidence on rape on the victim and in the peculiar facts and circumstances of that case, the sentence of imprisonment was reduced to the period already undergone which was about 3-1/2 years. In the present case, as pointed out earlier, the medical and other evidence strongly corroborates the evidence of the prosecutrix. Therefore, I find that the judgment in Raj Kumar does not help the accused in any manner.

20. For the aforesaid reasons, I find no substance in both the appeals. In the result, both the appeals stand dismissed. However, conviction is converted from section 376(2)(f) to section 376(1) I.P.C.

(J.H. BHATIA, J.)